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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

JOHNIE THROCKMORTON,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

No. 683.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in this case is reported at 179 F. (2d) 165.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Title 28, U. S. Code, Section 1254.

QUESTION PRESENTED.

The statement under "Question Presented," appearing at page 2 of the petition herein, does not properly nor accurately convey to the Court the question here involved. There is no question here involving **instructions** to a jury **ex parte** during the jury's deliberations. Instructions are not here involved and the occurrence was not ex parte. The sole question presented is simply: Is the decision of the United States Court of Appeals for the Eighth Circuit, holding in part that plaintiff was not prejudiced by the trial court's action in advising the jury that they might use a magnifying glass to examine exhibits, in conflict with the decisions of courts of appeals in other circuits or with decisions of this court.

ARGUMENT.

I.

The decision of the Eighth Circuit Court of Appeals in this case is not in conflict with the decisions of Courts of Appeals in other circuits on the same matter.

The decision is not in conflict with the decision of the Court of Appeals for the Third Circuit in **Arrington v. Robertson, 114 F. (2d) 821**, and is not in conflict with the decision of the Court of Appeals for the Tenth Circuit in **Parfet v. Kansas City Life Insurance Company, 128 F. (2d) 361**, because:

(A) The giving of supplementary instructions to the jury after it was deliberating on its verdict, not in open court, and in the absence of counsel, was involved in the foregoing cases; no such question is here involved. The question in this case involves the examination of exhibits with a magnifying glass; no question of supplementary instructions is present.

In the case at bar defendant furnished plaintiff a picture of the end of the tank car showing the hand brake thereon, which was marked Plaintiff's Exhibit 3 (R. 11, 275); a photographer enlarged a portion of the picture so furnished and it was marked Plaintiff's Exhibit 4 (R. 9, 10, 13). These exhibits were introduced and received in evidence (R. 10, 15). Plaintiff in the trial court contended that these exhibits showed that the brake there displayed was defective (R. 84, 90, 97, 100). A few days before this case was argued in the Court of Appeals, counsel for appellant filed the motion, with affidavits attached, which appears at pages 320-326 of the record. The Court of Appeals, in its opinion, assumed the truth of the allega-

tions and statements set forth in the motion and affidavits. The occurrence, then, of which petitioner complains, is this: The jury, by a note addressed to the trial judge, asked for permission to use a magnifying glass to examine the exhibits. The court replied by note: "You may do so." This, in the absence of counsel for both parties—not ex parte, as stated by petitioner.

There were no supplementary instructions sent to or read to the jury. Thus, an entirely different situation exists in the case at bar than that posed by the records in the cases cited by petitioner in his petition herein. The occurrence in the case at bar is the kind of thing which appellate courts describe and treat as a mere informality and in such situations it can be affirmatively determined from the record that no prejudice resulted to Appellant.

In **United States v. Compagna et al., 146 F. (2d) 524**, the Court of Appeals for the Second Circuit dealt with a comparable situation. In that case after the jury retired it sent a note to the trial judge asking that certain testimony be read to it. The judge went to the jury room to find out just what the jury wanted, and while in the jury room told the jury that the testimony requested would be read when the jury returned from lunch. Concerning the visit of the judge, the court said:

> "As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. • • • (Citing cases) • • •. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm

has been done, it would be the merest pedantry to insist upon procedural regularity. Dodge v. United States, supra, 258 F. 300, 7 A. L. R. 1510; Rice v. United States, 2 Cir., 35 F. 2d 689, 696; United States v. Graham, 2 Cir., 102 F. 2d 436, 444. There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused" (146 F. 2d 528).

In **Philadelphia and R. Ry. Company v. Skerman, 247 F. 269,** when the jury retired to deliberate it was furnished forms of verdict, one for a finding for plaintiff and the other for a finding for defendant; thereafter the trial court sent to the jury, in the absence of counsel, additional forms of verdict providing for a finding for plaintiff on the question of residence and for a statement by the jury that the jurors had agreed on the issue of negligence and providing for a statement by the jury that it had not agreed on the question of negligence. The court said at p. 272:

> "If what the judge did was irregular, it was in no way calculated to influence the jury nor prejudicial to the defendant. He gave them no instructions, and as we are satisfied that the jury were correctly advised as to the law of the case the judgment is affirmed."

The most that can be said of the action of the trial court in the case at bar is that it was an informality. It could not and did not prejudice the plaintiff. It is in no sense comparable to the question which arises in cases in which supplementary instructions on the law of the case are given by the court to the jury in the absence of counsel and not in open court. The rules of law announced in cases involving supplementary instructions are not applicable to the case at bar.

(B) Even assuming, however, that the cases involving supplementary instructions are applicable to the situation shown in the case at bar, nevertheless, the **Arrington** and **Parfet** cases, supra, are not in conflict with the opinion and decision in the case at bar. In the **Arrington** case the court made it very clear that it was dealing **only** with the question of supplementary instructions in writing to a jury. Such is demonstrated by the court's language at p. 822, where the court said:

> "The **sole question** presented on this appeal is whether it was reversible error for the trial judge, in the absence of counsel for the parties and without notice to them, to send **instructions in writing** to the jury, pursuant to an inquiry by them, after they had retired from the courtroom and while they were in the jury room deliberating upon their verdict." (Emphasis ours.)

The Court further clearly demonstrated that the reason it held the action of the Trial Court to be error was that the Appellate Court could not determine from the record whether the answer of the trial judge to the jury's question was or was not appropriate. The Appellate Court in the Arrington case very clearly indicated by its language, at p. 823 of the opinion, that if that Court could have determined from the record that the instructions were appropriate and complete and had resulted in no prejudice, then the case would not have been reversed.

Likewise, in the **Parfet** case, supra, the other case relied on by petitioner, the Court there indicated that it was dealing **only** with supplementary instructions. The Court, at p. 362 of the opinion, said:

> "It is error for the Court to receive a communication of **this** kind from the jury and make reply thereto in the **form of an additional instruction** in the ab-

sence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not **affirmatively** shown." (Emphasis ours.)

The Appellate Court went on to indicate, however, that if, as contended by respondent in that case, it had affirmatively appeared that any error in the additional instruction or in the manner in which it was given was harmless, then it would not have reversed the case. That this is the conclusion of the Court is demonstrated by the opinion at p. 362. The Court there considered the contention of respondent and concluded:

"Taken as a whole and fairly construed, the evidence did not conclusively establish suicide."

The Court in the **Parfet** case held that under that particular record they could not say that the record showed that the additional instruction was necessarily harmless.

As a matter of fact, it is settled law that even in criminal cases, involving the giving of supplementary instructions, an error which has not affected the substantial rights of an appellant will be disregarded. In the case of **Little v. United States, 73 F. (2d) 861,** the Court sent a stenographer into the jury room to read the Court's charge, in the absence of defendant and his counsel. While the Court held that under the record there it could not determine that the action of the trial court was harmless, nevertheless, the Court also said at p. 866 of the opinion:

"We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded."

The **Little case** is by the same circuit as the **Parfet case,** supra, and demonstrates conclusively that the decision in

the **Parfet case** does not mean, as petitioner contends, that under circumstances where the record shows that no prejudice resulted to appellant that a case will be reversed; and this, we repeat, even where supplementary written instructions on the law have been given to a jury deliberating on its verdict, in the absence of counsel and not in open court. This same doctrine is recognized in the Eighth Circuit, as demonstrated by the opinion in **Ray v. United States, 114 F. (2d) 508**, where at p. 513 the court said:

> "However, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal." (Citing many cases.)

The record in the case at bar affirmatively shows that no prejudice resulted to appellant; it was certainly proper to send exhibits to the jury room; it was proper to use a magnifying glass in examining the exhibits. **64 C. J., Sec. 827, p. 1033.** It was obvious to the Court of Appeals from the record in this case that the permission of the trial court to do a thing which the jury had a right to do and which examination by the jury could only magnify and amplify a defect claimed by Appellant, could result in no possible prejudice to Appellant. The Eighth Circuit, in so holding, in no possible way decided contrary to the decisions cited by petitioner.

The suggestion in petitioner's "reasons" (p 6), that counsel for plaintiff had a right to examine the magnifying glass is obviously without substance. There is no more reason to examine a magnifying glass than to make an examination of the glasses worn by particular members of every jury in every case. Eye glasses are themselves, in most instances, magnifying glasses. If a juror leaves his own glasses at home and borrows the glasses of a fellow juror to examine an exhibit that he may better

see it, would counsel suggest that a determination should first be made as to the exact image that the borrowed glasses would reflect? The fact of the matter is that the only purpose a magnifying glass could serve, irrespective of the type, make or model, would be to magnify and make more apparent the claimed defect in the brake which **plaintiff** contended at the trial existed and which **plaintiff** contended was displayed on the exhibits in question. Permission to use a magnifying glass to examine exhibits is in the same category with permission to replace a 60 watt bulb with a 100 watt bulb in the jury room, or with permission to a juror to send to his home to get his "reading glasses" so that he might use those particular lenses rather than the lenses in the "walking glasses" which he had on at the time he retired to deliberate on his verdict.

II.

The decision in the case at bar is not in conflict with the decision of the Eighth Circuit in **Wheaton v. United States, 133 F. (2d) 522.**

An examination of the opinion in that case will demonstrate that it was because the Court could not determine on the record there whether prejudice had resulted that it remanded the case to the trial court to make that determination. The Eighth Circuit in the **Wheaton** case did not, by any stretch of imagination, hold that where the record affirmatively shows no prejudice has resulted that it would do a needless and futile thing and remand the case for additional proof. We find nowhere in the opinion in the **Wheaton** case an admission by the Eighth Circuit that its opinion there was in any wise in conflict with any decision of the Tenth Circuit, as contended by petitioner at page 8 of his petition. The Eighth Circuit, in the case at bar, did not depart sub silentio or otherwise

from the **Wheaton** case, but rather applied its rule announced in **Ray v. U. S.**, supra.

III.

The decision in the case at bar is not in conflict with the applicable decisions of this Court and especially not in conflict with the decision of this Court in **Fillipon v. Albion Vein Slate Co.**, 250 U. S. 76, 63 L. Ed. 853.

In the **Fillipon** case this Court at page 82 specifically held that where it affirmatively appears that a supplementary instruction is harmless that a reversal is not required. Witness the language of the court, page 82:

> "And, of course, in jury trials, erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

The Court in that case went on to consider whether the supplementary instruction given was erroneous and determined that it was and reversed the case. This Court and the Courts of Appeal heed the provisions of Rule 61, Fed. Rules of Civil Procedure (governing trial courts), to disregard any defect which does not affect the substantial rights of the parties and a cause will not be reversed or sent back to the trial court for technical errors not affecting the substantial rights of the parties. Alleged errors which relate to merely formal or technical matters are not grounds for appellate action and even if the alleged error is not a mere formality, if it appears from the entire record that it was harmless and did not prejudice the rights of the complaining party, it is not reversible error.

CONCLUSION.

The Court of Appeals for the Eighth Circuit had the duty to determine and did determine that on the record in this case the action of the trial court in advising the jury that they might use a magnifying glass to examine exhibits could not and did not result in prejudice to Appellant, and in so holding that Court rendered a decision not in conflict with, but in accord with, the decisions of Courts of Appeal in other Circuits and the decisions of this Court. The permission by the trial court was at most an informality.

For the Court of Appeals to have sent this case back to the trial court to determine whether Appellant was prejudiced, when the Appellate Court determined from the motion and affidavits that no prejudice resulted, "would be the merest pedantry," a futile, a useless procedure.

Wherefore, it is respectfully submitted that the petition herein for a writ of certiorari should be denied.

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